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ABSTRACT

Noting that United States Supreme Court Justice William O. Douglas has often been characterized as an "absolutist" in terms of First Amendment policy, this paper argues that, in fact, Douglas's policy positions provided for less than absolute freedom to communicate. The paper then reveals, through an analysis of 18 of Douglas's opinions, an absolutism of a different sort: the reliance on "absolute philosophies and immutable canons," not so much for policy statements "per se," as for rhetorical means to generalized policy orientations. Based on this analysis, the paper offers evidence for the existence of a rhetorical genre, "argument from ideal," founded upon tenets of natural law philosophy. Various sections of the paper discuss (1) natural law theory, (2) argument from ideal, (3) the "Thomist" subspecies of argument from ideal, and (4) the "natural rights" subspecies of argument from ideal. (FL)

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ABSOLUTISM AND NATURAL LAW ARGUMENT: WILLIAM O. DOUGLAS ON FREEDOM OF EXPRESSION

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ABSOLUTISM AND NATURAL LAW ARGUMENT:
WILLIAM O. DOUGLAS ON FREEDOM OF EXPRESSION

Professor Scot Powe, Jr. of the University of Texas Law School has argued forcefully that William O. Douglas, over the course of his long tenure on the Supreme Court,[1] underwent an "Evolution to Absolutism" which resulted in his belief that "whenever pure expression is at issue, anything less than absolute protection is automatically inadequate."[2] Similarily, other writers have characterized Douglas as "a genuine 'strict constructionist'"[3] who relied upon "absolute philosophies and immutable canons"[4] in his view of the First Amendment.[5] Although these commentators have differed in the extent to which they approved of Douglas' judicial philosophy, they have all adopted relatively uniform, if sometimes unstated, perspectives on the meaning of the term "absolutism." They have meant it to mean that Douglas read the First Amendment literally; that when it said "Congress shall make no law," it meant no law, period.

Justice Hugo Black, one of Douglas' chief ideological mentors, was often characterized in the same way.[6] However, each man found exceptions to the First Amendment's "No law" command. Black's most notable exclusions fell under his so-called "theory of place" in which he argued that such communication situations as schools,[7] public buildings,[8] or private property[9] were outside the First Amendment's penumbra. Although in his later years on the bench Douglas admittedly never voted to outlaw expression, his judicial philosophy did provide theoretically for exceptions under his "speech brigaded with action" doctrine. He articulated this rule numerous times over his career, but stated it perhaps most concisely in his posthumously published autobiography, The Court Years: "Advocacy at some point can come so close to the line where action commences that the two become brigaded. Since the legislature can ban

the action, it can ban the advocacy that is closely blended with the action."[10]

What becomes clear is that the "absolutist" position, if it exists at all, is reserved to "pure speech" which is not closely "brigaded with action," and these terms are not the object of complete agreement, even between Black and Douglas.[11] Consequently, if the term "absolutism" is applied to communication events occurring in the unpure world of street protests, anti-war demonstrations, and labor disputes, a sufficient number of exceptions can be found to the commonly understood meaning of the term to question its usefulness as an index of judicial philosophy. But in another sense, Douglas' First Amendment opinions provide a view of "absolutism" which may be more accurate, and which should be of interest to both the student of jurisprudence and the rhetorician. In a significant number of his First Amendment opinions William O. Douglas did rely upon "absolute philosophies and immutable canons" by basing his arguments predominantly upon the necessarily absolute and self-evident premises of natural law theory. This paper provides a description and analysis of the rhetorical bases of such natural law reasoning, and thereby hopes to offer a somewhat more precise use of the label "absolutism" when referring to a portion of Justice Douglas' judicial philosophy. This study begins with a brief summary of natural law theory which leads to the positing of a potential rhetorical genre founded upon its tenets. We then turn to examples of such argument in the First Amendment opinions of Justice Douglas, and a discussion of the generic forms such a natural law warrant takes.[12]

Argument from Ideal: The Natural Law Warrant

Martin P. Golding summarized natural law philosophy when he wrote that thinkers in the tradition, "maintain that lawmaking is a purposive activity that must satisfy certain moral requirements in order for it to have laws as

its outcome. Secondly, they tend to maintain that the question of the existence of laws cannot be completely separated from the question of their moral obligatoriness or moral quality. Thus, natural law theorists adopt, or come close to adopting, a moral-deontic position."[13]

These two basic tenets of natural law thought, despite d'Entreves' warning to the contrary,[14] can be found in its defenders' writing for at least the last seven hundred years. Although roots of the tradition reside in the works of Plato, Aristotle, and Cicero, the first, and still most influential, specific elucidation of the philosophy is the Summa Theologica of St. Thomas Aquinas written in the thirteenth century. The essence of the Thomist position argued, in his words, "As Augustine says, that which is not just seems to be no law at all. Hence the force of a law depends upon the extent of its justice. . . . Every human law has just so much of the nature of law as it is derived from the law of nature. But if at any point it departs from the law of nature, it is no longer a law but a perversion of law."[15]

It is important to note how these ideas connect: the validity of law depends upon its adherence to a moral order, and the obligatoriness of law depends upon its validity. Therefore, an "invalid" law is not binding. The Thomist position achieved this nexus by reference to Eternal law, or the "rational guidance of created things on the part of God," and thus reached the postulate that "the Natural law is nothing else than the participation of the Eternal law in rational creatures."[16] Perhaps the most characteristic feature of natural law philosophy is its reliance upon propositions assumed to be self-evidently valid. Such an assumption guarantees that any law deduced from such propositions is binding.

A.P. d'Entreves, Professor of Political Theory in the University of Turin, argued that the intersection of the moral content of laws and the

attendant obligatoriness of laws was the thread flowing through the natural law tradition: "This point where values and norms coincide, which is the ultimate origin of law and at the same time the beginning of moral life proper, is I believe, what men for over two thousand years have indicated by the name of natural law."[17]

How this view of the nature of law might work in a judge's reasoning about cases was indicated by Columbia's Harry W. Jones who wrote that "in Natural Law theory any asserted statutory or case-law rule that fails to conform to the ought to be of the Natural Law is not law at all. Such an enactment, such a case-law principle, is as the Natural Lawyers say, 'law only in appearance.'"[18] Thus, when a judge exercises discretion in hard cases, he may in fact be applying natural law philosophy to fill the so-called "gaps" in the positive law.

From these Thomist and modern statements can be synthesized an operational definition of a potential rhetorical genre, herein called the Argument from Ideal, bound together by the fundamental tenets of natural law: Arguments drawing warrants from natural law philosophy rely predominantely or excluslively upon such self-evident moral-deontic principles as justice, unalienable rights, fairness, and the dictates of reason. Such arguments do not rely ultimately upon statue, precedent, extra-judicial evidentiary materials.

In addition to having origins in the literature of jurisprudence, the Argument from Ideal finds a corresponding analog in rhetorical theory which Richard Weaver termed the Argument from Genus:

> What the argument from genus then says is that 'generic' classes have a nature which can be predicated of their species. Thus man has a nature including mortality, which qualify can therefore be predicated of the man Socrates and the man John Smith. The underlying postulate here,

> that things have a nature, is of course a disputable view of the world, for it involves the acceptance of a realm of essence. Yet anyone who uses such a source of argument is committed to this wider assumption. Now it follows that those who habitually argue from genus are in their personal philosophy idealists.[19]

Argument from Ideal thus involves certain epistemological, rhetorical, and jurisprudential presuppositions. By holding these presuppositions central, an analysis of actual opinions may reveal a rhetorical genre whose "internal dynamic"[20] is predicated upon them.

The Internal Dynamic of Natural Law: The Argument from Ideal

Analysis of Douglas' First Amendment opinions produced two overall observations: first, William O. Douglas based eighteen opinions upon tenets of natural law philosophy.[21] While eighteen of his career total for First Amendment opinions is admittedly a small number (according to LEXIS he authored 207), the fact that they are there at all deserves careful scrutiny. Natural law has been most typically conceived as the rationale for revolutionaries and religionists, not justices of the United States Supreme Court. But before concluding that Douglas occasionally indulged in jurisprudential excesses, we must note the second overall observation made about Douglas' use of the Argument from Ideal: all natural law arguments are not alike. Two sub-species of the genre were, in fact, evident. The first is what will be called the "Thomist" version of the argument,[22] while the second will be referred to as a "Natural Rights" version of natural law.

Argument from Ideal: The Thomist Sub-Species

The term "Thomist" is adopted because it best denotes an unadorned natural law ontology as its warrant. As Oxford's H.L.A. Hart observed, St. Thomas' proposition, "lex iniusta non est lex" ("an unjust law is not

law"), remains the clearest and most coherent statement of the core of natural law philosophy. Professor d'Entreves agreed that St. Thomas' system of natural law remained unsurpassed in perspicacity and eloquence and added an explanation of what is meant by the doctrine of natural law as an ontology: "The ontological approach maintains that the very notion of natural law stands or falls on [an] identification [between] is and ought, between 'fact and values,'"[23] Aquinas himself articulated the political implication of this proposition when he asserted that if secular rulers (or, by implication, the laws enacted by them) "command things to be done which are unjust, their subjects are not obliged to obey them."[24]

The natural lawyers were not indulging in abstractions in advocating the notion that unjust laws could claim no binding obligation upon the people under their regime, and this insistence gave rise to the central clash between natural law theory and legal positivism. With an understated touch of satire, John Austin, the Englishman who fathered modern positivism, met the claim head-on:

> Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not law, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning

by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.[25]

It may be stark nonsense in John Austin's view, but William O. Douglas, on more than one occasion, based United States Supreme Court opinions on just such claims--that the citizen possessed the right, even the duty, to disobey or ignore unjust laws. This is the natural law ontology--the Thomist version of Argument from Ideal--the merging of being with value. But how does it look when published in United States Reports?

Two examples of the ontological, Thomist version of the Argument from Ideal should suffice.[26] The first came in the case of Poulos v. New Hampshire in 1953, in which the Supreme Court upheld the conviction of a Jevohah's Witness for conducting a religious service without first obtaining a permit. The case turned directly on the issue of whether a citizen could disobey a law he believed to be unconstitutional. The Court said no, but Douglas, in a dissent joined by Hugo Black, disagreed and raised the notion of popular sovereignty to the level of natural law: "When a legislature undertakes to proscribe the exercise of a citizen's constitutional right to free speech, it acts lawlessly; and the citizen can take matters in his own hands and proceed on the basis that such a law is no law at all."[27] When Douglas said that, he echoed verbatim St. Thomas' edict that "lex iniusta non est lex." The citizen's right to ignore positive laws stood out even more clearly in his next paragraph: "No matter what the legislature may say, a man has the right to make his speech, print his handbill, compose his newspaper, and deliver his sermon without asking anyone's permission. The contrary suggestion is abhorrent to our traditions."[28]

The underlying epistemological inference Douglas implied in such arguments is also Thomistic: In Aquinas' scheme, the "law of man . . . is that he should act in accordance with reason," and that "the natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[29] So whence cometh the citizen's right to ignore or disobey duly enacted positive laws? From his reason--his innate ability to know "good from evil," even though "good and evil" may take the arcane form of constitutional and unconstitutional. Possessing this ability to know, he is thus mandated to follow St. Thomas' "first precept of law, that good is to be done and promoted, and evil is to be avoided."[30] The civil rights struggle of the 1960's provided the backdrop for Douglas' most explicit statement of this warrant.

Prior to Easter weekend, 1963, a group of black ministers applied to Birmingham's Public Safety Commissioner, Eugene "Bull" Connor, for permits to parade on Friday and Sunday. They were denied the permits and issued an ex parte injunction prohibiting them from any sort of demonstrations or marches. They marched in defiance of the injunction, were arrested, convicted of contempt, and a 5-4 Supreme Court upheld the conviction. Justice William O. Douglas' dissent again conjoined the epistemological and political implications of Thomism by insisting that: "The right to defy an unconstitutional statute is basic in our scheme. Even when an ordinance requires a permit to make a speech, to deliver a sermon, to picket, to parade, or to assemble, it need not be honored when it is invalid on its face."[31] The full import of such a statement must take into account that the case in point involved defendants who were not trained jurists confronting not only laws, but court injunctions issued in their absence. Still, Douglas argued that they could defy the secular power: "An ordinance--unconstitutional on its face or patently unconstitutional as applied--is not made sacred by an unconstitutional injunction that enforces it. It can and should be

flouted in the manner of the ordinance itself."[32] Douglas' use of the term "invalid on its fact" twice seems to indicate that the citizen possesses the ability to make that decision. If we equate the twentieth-century American manifestation of natural law as argued by William O. Douglas with the thirteenth-century version as argued by Thomas Aquinas, we see "constitutional and unconstitutional," "valid on its face--invalid on its face," as the rhetorical equivalent of "good and evil--just and unjust" with the corollary in both centuries being that "evil is to be avoided." Indeed, Father John C. Murray, S. J., a contemporary American natural law proponent, uses the term "justice is to be done and injustice avoided," and asserts it to be one of only two self-evident principles in natural law, the other being the maxim, "suum cuique."[33]

Thus the abstract doctrine of Aquinas excused thirteenth century subjects from obligation to obey unjust commands of their rulers; William O. Douglas' rhetorical stance in this dissent excused twentieth century civil rights leaders from any obligation to obey "Bull" Connor's unconstitutional court orders.

Argument from Ideal: The Natural Rights Sub-Species

A second sub-species of the Argument from Ideal emerged upon analysis of the eighteen opinions relying upon natural law warrants. In a number of opinions Douglas seemed to proceed from a "Natural Rights" version of natural law philosophy. This sub-species of the argument is similar to the "Thomist" version just discussed, but differs in that these arguments identify a specific right as the defense for doing or forbearing from certain actions, and suggests that such rights inhere in the human condition. They may proceed from man's "divine" qualities or his "rational" qualities, but they are in either case "unalienable" from action from the state. In addition to certain rights inhering in the human condition, Douglas argued that they reside in the American condition

as a function of the Bill of Rights. The jurisprudential upshot of this aspect of the argument is of signal importance.

Hans Kelsen, an influential proponent of legal positivism, pointed out the connection between metaphysical precepts like "equal justice under law," "popular sovereignty," or "liberty," and positive laws like the First Amendment. In Kelsen's scheme, all positive laws derive their validity by descendancy from super-ordinate laws. A search for a law's validity thus leads to a regress up the "pedigree" until we reach the "basic norm." In the United States, the regress would eventually reach the Constitution, and Kelsen stipulated for any legal order "that the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order."[34] What Kelsen is implying is that once we reach the most basic positive law, we still have one step left in our search for the basic norm, and that step moves us outside the positive legal system and, ipso facto, into natural law. Kelsen went on to explain how natural law thus gains access to the positive legal order: "The basic norm is not itself a made, but a hypothetical presupposed norm; it is not positive law, but only its condition. Even this clearly shows the limitation of the idea of legal 'positivity.' The basic norm is not valid because it has been created in a certain way, but its validity is assumed by virtue of its content. It is valid, then, like a norm of natural law, apart from its merely hypothetical validity. The idea of a pure positive law, like that of natural law, has its limitation.[35] This binding together of natural rights with positive legal rights reached rhetorical fruition in a number of Douglas' First Amendment opinions.

The well-known case of Public Utilities Commission v. Pollak provided the first example, and one of the clearest, of how Douglas opened the positive legal order to natural law. In Pollak the Court ruled that city busses in the District of Columbia could retain the use of loudspeakers playing FM music and

commercial announcements without violating the First or Fifth Amendment. Because of the notion of "captive audience" Douglas felt otherwise, and dissented. In doing so he illustrated how natural law can provide the warrant for positive law: "The case comes down to the meaning of 'liberty' as used in the Fifth Amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. . . . The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief. To think as one chooses, to believe what one wishes are important aspects of the constitutional right to be let alone."[36]

Clearly both The First and Fifth Amendments rest, in Douglas' view, on warrants outside the legal system. If, in the case of the Fifth Amendment, the right to be let alone is "the beginning of all freedom," and if, in the case of the First Amendment, "its respect from the conscience of the individual honors the sanctity of thought and belief," we appear to have a paradigm case of a fundamental tenet of natural law: it is the function of positive law to sanction natural law. Professor d'Entreves argued on this point that "human laws must be established to draw out all the conclusions of natural law," so that ultimately, "all law, eternal and natural, human and divine, is linked together in a complete and coherent system."[37] William O. Douglas' examples of "Natural Rights" rhetoric compose just such a coherent system with the Bill of Rights as the bridge between the "human and divine."[38] The First Amendment, a man-made positive law, thus reaches outside the legal system and embraces a natural right, "the sanctity of thought and belief."

Other cases reveal this rhetoric even more explicitly. In McGowan v. Maryland the Court sustained the validity of Maryland's "blue laws," and

again, Justice Douglas dissented. Perhaps no clearer statement of positive laws functioning to sanction natural laws can be found than in this dissent: "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. . . The body of the Constitution and the Bill of Rights enshrined these principles."[39] The two aspects of this argument, that a higher moral law exists, and that its existence negates certain powers of the state, are rhetorically (and philosophically) bridged by the Constitution, and especially the Bill of Rights, here metaphorically represented as a "shrine." The metaphor is not without significance--by building a shrine of positive laws rather than theological dogma, we construct the phenomenon of secularized natural law and thereby escape religion's near monoply on the philosophy.[40]

The metaphysical precept, the "authority higher than the authority of the state," (in Kelsen's term the "basic norm"), which provides the warrant for these arguments in numerous Douglas opinions is popular sovereignty. Popular sovereignty (suum cuique?) is asserted to be a higher moral law whose self-evident validity constrains government from proscribing some specific right. Douglas' most unambiguous statement of the argument came in United States v. International Union of Automobile, Aircraft, and Agricultural Implement Workers of America in 1957. The second paragraph of his dissent began with the major premise that "Under our Constitution it is We the People who are sovereign. The people have the final say."[41] That statement is then linked to a specfic set of rights flowing from it: "First Amendment rights are part of the heritage of all persons and groups in this country." And, therefore, he concludes, government is powerless to alter such rights: "They are not to be dispensed with merely because we

[the court] or the Congress thinks the person or group is worthy or unworthy."[42] The jurisprudential implication of this syllogism is that Douglas is using positive law to sanction natural law, just as d'Entreves insisted that it should.

The argument had been made five years earlier, but popular sovereignty as the basic norm was left at the implicit level in Douglas' dissent in Beauharnis v. Illinois, a case which upheld the "group libel" conviction of the defendant. Then Douglas said that the term, "shall not be abridged," "is negation of power on the part of each and every department of government. Free speech, free press, free exercise of religion are placed separate and apart; they are above and beyond the police power; they are not subject to regulation in the manner of factories, slums, apartment houses, production of oil, and the like."[43]

Not surprisingly, Douglas' use of this argument form rarely occurred in majority opinions, but it was equally explicit when it did. In Girourard v. United States (1946) the Court ruled that an alien claiming conscientious objector status could not be denied citizenship for that reason alone. With characteristic clarity, Douglas based the Court's opinion on the natural rights version of the Argument from Ideal: "The struggle for religious liberty has through the centuries been an effort to accomodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than sub-ordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."[44] Once again, the norm of popular sovereignty is asserted, here more clearly than before in the form of "suum cuique" when Douglas points to "conscience of the individual" and "freedom of thought." That self-evident metaphysical postulate is ensconced in the positive legal order when he says

that "our Bill of Rights recognizes . . ." As a consequence, the government is thereby restrained: "Freedom of religion [is] guaranteed by the First Amendment."

Mr. Douglas' concurring opinion in Joint Anti-Facist Refugee Committee v. McGrath, Attorney General also provided a clear example of the rhetorical bridging of value postulates outside the positive legal order to specific provisions within the legal order itself. In this case, three organizations had sued in federal court for declaratory and injunctive relief, claiming that Attorney General McGrath's order placing their names on lists of subversive organizations had caused them irreparable damage. The District court granted McGrath a motion to dismiss, the Court of Appeals affirmed the motion, and the Supreme Court reversed, with Douglas concurring in that result. Again present in this opinion is the notion of self-evidently valid postulates, by virtue of their inherent appeal, placing restraints on governmental action. The plaintiffs had objected mainly that the Attorney General's order had given them no opportunity to reply. This, Douglas argued, was forbidden, for "government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice as we know it, call for notice and hearing--an opportunity to appear and rebut the charge."[45] The rudiments of justice, natural rights possessed by all humans, are sanctioned for Americans, in Douglas' argument, again by the Bill of Rights: "Steadfast adherance to strict procedural safeguards is our main assurance that there will be equal justice under law."[46] In this case, then, the basic norm takes shape as "the rudiments of justice," and as "equal justice under law" rather than popular sovereignty, but still central to the argument is the rhetorical link achieved between moral norms and legal norms, between the "human and the divine," between the is and the ought to be.

Conclusion

This paper began with descriptions of Justice Douglas which characterized him as an "absolutist" in terms of First Amendment policy, a view held by scholars, senators, and journalists alike. In fact, Douglas' policy positions, both actually and theoretically, provided for slightly less than absolute freedom to communicate. The foregoing examination of eighteen of his opinions revealed an absolutism of a different stripe: the reliance in Resnik's term, on "absolute philosophies and immutable canons," not so much for policy statements per se, as for rhetorical means to generalized policy orientations. The analysis further yielded a clarification of how such arguments work--it has helped discover and describe their "internal dynamic."

In one sub-species of the genre, the Thomist as herein, called an ontological bond between existence and value--an unjust law is not a law--serves as the rhetorical warrant for the political behavior pursuant to it. But the argument must include epistemological elements as well as metaphysical--the citizen must be viewed as capable of knowing just from unjust, even constitutional from unconstitutional before he can, in Douglas' term "flout" the law. The Thomist version of Argument from Ideal thus assumes a syllogistic form: Major Premise: An unjust law is no law; Minor Premise: Individual citizens possess the ability to know just from unjust; Conclusion: individual citizens are not obliged to obey laws they perceive as unjust.

The natural rights version of the Argument from Ideal proceeds from a similar syllogistic internal dynamic: Major Premise: Individual human beings are sovereign creatures with certain natural rights; Minor Premise: The Bill of Rights sanctions specific natural rights flowing from the doctrine of popular sovereignty; Conclusion: government is powerless to alter the sovereign rights of individuals since those rights were not granted by government. All elements

of the argument must be present in just this dynamic relationship, and in a number of opinions by William O. Douglas, they were.

This study has also offered evidence suggesting the existence of a rhetorical genre, "The Argument from Ideal," based upon tenets of natural law philosophy. One central implication of the existence of a rhetorical genre based upon legal philosophy inhering in judicial opinion brings us back to a basic concern of this study, the more accurate use of terms for classifying Supreme Court justices. That implication is that jurisprudence should not be a means of labeling a justice, but a schema for classifying his arguments. By understanding jurisprudence in a rhetorical light, we can better evaluate the judge, his arguments, and the legal philosophy as well.[47]

ENDNOTES

[1]Justice Douglas' career spanned thirty-seven years and was the longest in the history of the Supreme Court.

[2]L.A. Powe, Jr., "Evolution to Absolutism: Justice Douglas and the First Amendment," Columbia Law Review (1974), p. 396. Professor Powe is a former Douglas law clerk.)

[3]William Ringle (Gannette News Service), "Douglas Retained 'Absolutist' View of the First Amendment," Shreveport-Bossier Times, January 20, 1980, p. 2-C.

[4]Solomon Resnik, "Black and Douglas: Variations in Dissent," (Ph.D. Dissertation, The New School for Social Research, 1970), quoted in Dissertation Abstracts 31 (1971), p. 6130-A.

[5]In addition to scholars and journalists, a number of United States Senators shared the impression of Douglas as an "absolutist." Senator of McGee of Wyoming said that the "most basic freedoms--speech, press, and self-determination--are his commandments. He has never altered or relinquished those beliefs." Abraham Ribicoff wrote that Douglas saw "the Bill of Rights as providing a measure of essential protection to the individual--as an ultimate, inviolable limit on the power of Government." And Walter Mondale saw Douglas as an "uncompromising foe to every sedition and censorship statute." [emphasis added] Quoted in Tributes to Honorable William O. Douglas, Associate Justice of the Supreme Court, To Commemorate the Occasion of His Retirement from the

Supreme Court, November 12, 1975. (Washington: U.S. Government Printing Office, 1976), pp. 99, 103, 107.

[6]The most comprehensive collection of essays on Black's First Amendment philosophy is: Everette E. Dennis, Donald M. Gillmor, and David L. Grey, Justice Hugo Black and the First Amendment, (Ames, Iowa: Iowa State University Press, 1978).

[7]Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). Dissenting opinion.

[8]Cox v. Louisiana, 379 U.S. 536 (1965). Concurring opinion.

[9]Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). Dissenting opinion.

[10]William O. Douglas, The Court Years: 1939-1975, (New York: Random House, 1980), p. 93.

[11]The issue, of course, turns on the notion of what constitutes "pure speech" and what constitutes "speech plus," the former deserving absolute protection, the latter something less than that. There is by no means agreement among "absolutists" about where this line should be drawn. Douglas, for example, concurred with Justice Fortas that the black arm bands worn by public school students in the Tinker v. Des Moines case were "akin to pure speech," (393 U.S. at 505), but Black dissented vigorously, arguing that "It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases

and when he pleases." This led Black to conclude that "public schools are operated to give students an opportunity to learn, not to talk politics by actual speech, or by 'symbolic' speech." (393 U.S. at 522, 523-524. Emphasis added.)

[12]The present study is based in part on the author's doctoral dissertation, "Justice William O. Douglas on the First Amendment: Rhetorical Genres in Judicial Opinion," (Ph.D. dissertation, University of Oklahoma, 1979). The dissertation was directed by Dr. Paul A. Barefield.

[13]M.P. Golding, Philosophy of Law (Englewood Cliffs, NJ: Prentice Hall, 1975), p. 25.

[14]A.P. d'Entreves is an Italian subscriber to the natural law tradition who argues that "except for the name, the medieval and the modern notions of natural law have little in common." Natural Law: An Introduction to Legal Philosophy, 2nd ed., (London: Hutchinson & & Co., 1970), p. 15.

[15]Summa Theologica, in Anton C. Pegis, ed., Basic Writings of St. Thomas Aquinas (New York: Random House, 1954), p. 784.

[16]St. Thomas Aquinas, Summa Theologica, quoted in d'Entreves, p. 43.

[17]d'Entreves, p. 116.

[18]Harry W. Jones, "Legal Realism and Natural Law," in M.P. Golding, The Nature of Law: Readings in Legal Philosophy. (New

York: Random House, 1966), p. 265.

[19]Richard Weaver, The Ethics of Rhetoric (Chicago: Henry Regenery Company, 1970), p. 56.

[20]Space precludes (nor does necessity compel) a detailed discussion here of the theory of rhetorical genres. Suffice it to say that the present study was guided by the definition suggested by Campbell and Jamieson who required that when a critic purports to have found a rhetorical genre, the claim is being made that "a group of discourse has a synthetic core in which certain significant rhetorical elements, e.g., a system of belief, lines of argument, stylistic choices, and the perception of the situation, are fused into an indivisible whole." Such a confluence of factors constitutes an "internal dynamic." Karlyn Kohrs Campbell and Kathleen Hall Jamieson, Form and Genre: Shaping Rhetorical Action (Falls Church, VA: Speech Communication Association, 1978), p. 21.

[21]These opinions were selected for analysis through use of the LEXIS system of computerized legal data retrieval. For a discussion of the system in general and this study's search request in particular, see Raymond S. Rodgers and Paul A. Barefield, "Computerized Legal Data Retrieval in Communication Research: A Report on the LEXIS System," Virginia Journal of Communication I, (September, 1980), pp. 10-13.

[22]This term by no means intends to suggest that Thomism can be reduced to a shorthand phrase. On the contrary, it is a complex and subtle web spun from such diverse strands as Stoicism, Aristotelian political theory, Augustinian Christian doctrine, and early medieval rationalism. For an excellent account of the philosophical influences upon Thomas Aquinas' Summa Theologica, see A.P. d'Entreves, Natural Law, 2nd ed., (London: Hutchinson University Library, 1970).

[23]d'Entreves, "Three Conceptions of Natural Law," in M.P. Golding, The Nature of Law, p. 42.

[24]Aquinas, Summa Theologica, 2a-2ae, 104, 6. Quoted in d'Entreves, Natural Law, p. 46.

[25]John Austin, The Province of Jurisprudence Determined, Lecture VI (1832), reprinted in Golding, The Nature of Law, pp. 96-97.

[26]It is most important to understand that the following excerpts are not asides or afterthoughts, they are the basis of the entire opinion--the warrant which, to this researcher, appeared to undergird the total argument.

[27]345 U.S. 395 (1953) at 423. (Emphasis Added)

[28]Ibid. (Emphasis Added)

[29]Quoted in Golding, The Nature of Law, p. 15, 12.

[30]Ibid, p. 18.

[31]Walker v. Birmingham, 388 U.S. 307 (1967) at 336.

[32]Ibid., at 338. (Emphasis Added)

[33]John C. Murray, SJ, We Hold These Truths: Catholic Reflections on the American Proposition, (New York: Sheed and Ward, Inc., 1960), p. 332.

[34]Quoted in Golding, The Nature of Law, p. 127. (Emphasis added)

[35]Ibid., pp. 133-134. (emphasis added)

[36]343 U.S. 451 (1952) at 467, 368.

[37]d'Entreves, Natural Law, p. 47.

[38]Two points should be kept in mind regarding Douglas' invocation of the Constitution as the probitive base of an argument. First, he used the document differently for different purposes. When supporting a natural law argument, he stressed the ideals upon which the document rests: popular sovereignty, individual dignity, natural rights, etc. When supporting a positive law argument by reference to the Constitution, Douglas stressed the rule manifestly stated in the document (e.g., "Congress shall make no law . . ."). Second, Douglas sometimes evinced a key tenet of natural law philosophy which stipulates that a function of the positive law is to give sanction to the natural law. Thus, when an article or amendment to the Constitution is made to serve as the bridge from what is to what ought to be, we must classify that argument

on the basis of how the Constitution is being used rather than on the basis of its manifest content.

[39]366 U.S. 420 (1961) at 562.

[40]Father Murray's book, We Hold These Truths: Catholic Reflections on the American Proposition, although a lucid and valuable source on natural law philosophy, also exemplifies what results when the doctrine of separation of church and state assumes a lower priority than sectarian doctrine. Fr. Murray asserts that, "the principles of Catholic faith and morality stand superior to, and in control of, the whole order of civil life. The question is sometimes raised, whether Catholicism is compatible with American democracy. The question is invalid as well as impertinent; for the manner of its position inverts the order of values. It must, of course, be turned round to read, whether American democracy is compatible with Catholicism." (at pp. ix-x.)

[41]352 U.S. 567 (1957) at 593.

[42]Ibid., at 597.

[43]353 U.S. 250 (1952) at 286.

[44]328 U.S. 61 (1946) at 69.

[45]341 U.S. 123 (1951) at 178.

[46]Ibid., at 179.

[47]The study upon which this essay was based (see note 12 above) found that Douglas, who has most typically been classified as a legal realist, in fact relied upon arguments characteristic of legal positivism most frequently, upon legal realist arguments second most often, and upon natural law arguments least frequently. The opinions judged to be based upon the Argument from Ideal not cited in this study were: Terminiello v. Chicago, 337 U.S. 1 (1949); Carlson v. Landon, 342 U.S. 524 (1952); Peters v. Hobby, et al, 349 U.S. 331 (1955); Frank v. Maryland, 359 U.S. 360 (1959); Engel v. Vitale, 370 U.S. 421 (1962); Arlans Department Store of Louisville, Inc., v. Kentucky, 371 U.S. 218 (1962); Gillette v. United States, 401 U.S. 437 (1971); Clay aka Ali V. United States, 403 U.S. 698 (1971); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).